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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOHN DOE,

Plaintiff,

vs.

THE BOARD OF TRUSTEES OF
WHITMAN COLLEGE, A non-profit
corporation

Defendant.

Case No.: 4:23-cv-05051-MKD

MOTION FOR TEMPORARY
RESTRAINING ORDER
4/24/2023
With Oral Argument 2:15 p.m.
Via Zoom

**PLAINTIFFS' MOTION FOR A TEMPORARY
RESTRAINING ORDER- 1**
CASE 4:23-cv-05051-MKD

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I. RELIEF REQUESTED

Plaintiff, pursuant to Rule 65 of the Federal Rules of Civil Procedure seeks a temporary restraining order preventing Defendant Whitman College (“Whitman”), from expelling him just weeks before his graduation based on a flawed investigation and hearing pertaining to events from 2019, which denied him substantive rights promised to him by Whitman and guaranteed under Title IX.

II. EVIDENCE RELIED UPON

The Plaintiff relies on the allegations raised in the verified complaint, ECF No. 1.1, the Declaration of John Doe attached to this motion, and the other papers and pleadings filed in this action.

III. STATEMENT OF FACTS

Plaintiff John Doe (“Doe,” he/him) and the complainant from the underlying Title IX proceeding (“Complainant,” femme nonbinary they/them) met during the first week of freshman year and were romantically and sexually involved between September 2019 and December 2019, until Doe broke up with Complainant. *Complaint* ¶ 8. During that time, Doe and Complainant frequently engaged in consensual sexual activity. *Id.* In September 2021, someone anonymously contacted Doe’s soccer coaches to report that he had abused his ex-girlfriend. *Complaint* ¶ 23. Complainant was Doe’s only ex-girlfriend at Whitman and was perplexed at the

1 allegation since there had been no abuse in their relationship. *Id.* ¶ 23. On October
2 2, 2021, Doe called Complainant to tell her about the allegation and they assured
3 him over the phone that he had never been abusive to them. *Id.* at ¶ 23. They later
4 texted him to reiterate that he never abused them, providing:
5

6 It's fucked up and idk how this is being fabricated and
7 spread [.] And I do want to clarify that I haven't talked
8 about our relationship to anyone at Whitman and when I
9 did I never said you abused me or anything remotely like
10 that [.] Whoever's doing this knows nothing about me or
11 you [.]

12 *Id.* ¶ 24. Around this time, Complainant also called their former roommate
13 (identified in the underlying Title IX investigation as Witness A) to express
14 curiosity and annoyance that someone had filed a complaint with the soccer team
15 on their behalf. *Id.* ¶ 25. They told Witness A that they never thought of their
16 relationship with Doe as abusive or nonconsensual. *Id.* ¶25.

17 During what appears to have been a manic episode as a result of their
18 unmedicated bipolar disorder, Complainant changed their mind as to the nature of
19 their relationship with John Doe sometime later in October 2021 and alleged that
20 John Doe had, in fact, abused them over the course of the relationship. *Id.* ¶ 26-29.
21 On November 20, 2021, Complainant publicly posted on their Instagram story
22 visible to hundreds of Whitman students a photo of Doe with the caption:
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24
25

1 this man r@ped me until I developed stockholm syndrome
2 - the sexual abuse continued throughout the relationship.

3
4 *Id.* ¶ 30. The response by Doe’s classmates within the highly politicized climate on
5 campus regarding sexual assault to this very public allegation by Complainant at
6 Whitman was humiliating and intense. *Id.* ¶ 31. Doe was severely emotionally
7 affected by these very public allegations. *Id.* Doe lost ten pounds and experienced
8 intense back and shoulder pain from hours spent lying in bed because of depression.
9
10 *Id.* He continued to experience significant anxiety including intermittent panic
11 attacks. Ultimately, Doe was forced to change his living situation as a result of the
12 allegations. *Id.*

14 Complainant filed a police report in April 2022 which was investigated and
15 ultimately not pursued as credible by the Walla Walla Police Department. *Id.* ¶ 35.
16
17 Still upset, Complainant – who had not attended school at Whitman for over a year
18 – filed a Title IX complaint in May 2022. *Id.* ¶ 36. Notably, Complainant explained
19 to a witness in the proceedings that their intent for engaging in the Title IX process
20 was simply to “to do my best to fuck with” [Doe’s] future. *Id.* ¶ 38.

22 This kicked off a multi-month investigation, rife with bias and procedural
23 errors as detailed in the complaint. *Id.* ¶ 37-62. For example, Doe was prohibited
24 from raising Complainant’s mental health history to the hearing panel and denied
25

26 **PLAINTIFFS’ MOTION FOR A TEMPORARY**
27 **RESTRAINING ORDER- 4**
CASE 4:23-cv-05051-MKD

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1 the opportunity for this procedural error to be considered on appeal, despite
2 Complainant specifically raising mental health as an issue. *Id.* ¶ 59, 72. The Title
3 IX Hearing Investigator permitted an unrelated witness (Witness C), who had a one-
4 time sexual encounter with Doe, to show a “pattern and practice” of abuse by
5 Complainant but refused Doe’s efforts to introduce a long-time partner as evidence
6 of a “pattern of practice” of consent. *Id.* ¶ 37-40. Notably, the Whitman Hearing
7 Panel went to great lengths to avoid exonerating Doe regarding his interactions with
8 Witness C as consensual by referring to it in the double negative of “not
9 unwelcome.” *Id.* ¶ 65. This discriminatory bias was likewise rejected as an
10 appealable issue by Whitman. *Id.* ¶ 72.

14 Not surprisingly, Whitman denied Doe’s appeal and upheld its finding that
15 he had engaged in “forcible rape.” *Id.* ¶ 73. These findings were not based on an
16 actual incident of nonconsensual sexual contact but because “Complainant said that
17 [they] relented to [Doe’s] frequent advances” since Doe asked if Complainant was
18 ready to engage in sexual intercourse multiple times over the first few weeks of
19 their relationship. *Id.* ¶ 64. The Hearing Panel concluded “[Doe’s] verbal pressure
20 constituted coercion as defined by Whitman College policy” and “consent is
21 invalidated by the application of force, and [therefore] Respondent used coercive
22 force to engage in sexual penetration of Complainant.” *Id.*

26 **PLAINTIFFS’ MOTION FOR A TEMPORARY**
27 **RESTRAINING ORDER- 5**
CASE 4:23-cv-05051-MKD

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As the sanction for Doe’s offense of “forcible rape,” Whitman recommended expulsion just seven weeks before Doe was set to graduate for the conclusory reason that forcible rape “relate[s] to some of the most egregious forms of conduct prohibited by Whitman College.” *Declaration of John Doe* (“Doe Decl.”) exhibit 3 at 13. The decision-makers did not take into account that Complainant is no longer on campus or that Doe could complete his final seven weeks of college off-campus after years of work.

IV. NOTICE

Plaintiff gave notice via counsel to attorney for the Defendant in an email of his intent to seek a temporary restraining order enjoining Defendant from expelling him on March 27, 2023.

V. ARGUMENT AND AUTHORITY

A. Legal Standard.

Pursuant to Federal Rule of Civil Procedure 65, the Court may grant preliminary injunctive relief in order to prevent “immediate and irreparable injury.” Fed. R. Civ. P. 65(b)(1)(A). The standard for issuing a temporary restraining order is the same as the standard for issuing a preliminary injunction. *Florer v. Peck*, No. CV-05-5039-EFS, 2007 WL 9717447, at *2 (E.D. Wash. Oct. 10, 2007). To obtain this relief, a plaintiff must demonstrate: (1) a likelihood of success on the merits;

**PLAINTIFFS’ MOTION FOR A TEMPORARY
RESTRAINING ORDER- 6**
CASE 4:23-cv-05051-MKD

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(2) a likelihood of irreparable injury in the absence of preliminary relief; (3) that a balancing of the hardships weighs in plaintiff's favor; and (4) that a preliminary injunction will advance the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008); *M.R. v. Dreyfus*, 697 F.3d 706, 725 (9th Cir. 2012). Under the *Winter* test, a plaintiff must satisfy each element for injunctive relief.

Alternatively, the Ninth Circuit also permits a “sliding scale” approach under which an injunction may be issued if there are “serious questions going to the merits” and “the balance of hardships tips sharply in the plaintiff's favor,” assuming the plaintiff also satisfies the two other *Winter* factors. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (“[A] stronger showing of one element may offset a weaker showing of another.”).

B. Plaintiff is Likely to Succeed on the Merits of His Claim

1. Title IX

The Plaintiff is likely to succeed on his claim that Whitman violated his rights under Title IX because the College discriminated against him during the Title IX hearing process on the basis of sex. The Ninth Circuit recognizes a cause of action under Title IX when a college or university, who receives federal funds, imposes discipline where gender is a motivating factor in the discipline. *Schwake v. Arizona*

1 *Board of Regents*, 967 F.3d 940, 947 (9th Cir. 2020). The Ninth Circuit adopted a
2 “far simpler standard” for Title IX claims in this context – “whether the alleged
3 facts, if true, raise a plausible inference that the university discriminated against the
4 plaintiff on the basis of sex?” *Schwake*, 967 F.3d at 947 (cleaned up) (citing *Doe v.*
5 *Columbia Coll. Chi.*, 933 F.3d 849, 854–55 (7th Cir. 2019)). Sex discrimination
6 need not be the only plausible explanation or even the most plausible explanation
7 for a Title IX claim to proceed. See *Doe v. Baum*, 903 F.3d 575, 586 (6th Cir. 2018).
8

9
10 Since *Schwake*, the Ninth Circuit has identified three broad categories of
11 evidence that tend to support Title IX claims in this context – external pressure on
12 the College regarding Title IX, internal patterns and practices of bias against male
13 students, and allegations of specific instances of bias in the individual’s case,
14 including procedural irregularities. See *Doe v. Regents of University of California*,
15 23 F.4th 930, 936-940 (9th Cir. 2022).
16
17

18 Regarding external pressures on colleges and universities, courts have looked
19 to government guidance surrounding Title IX, including the April 2011 “Dear
20 Colleague Letter” from the Department of Education (“DOE”) “directing schools
21 to take ‘immediate action’ to eliminate sexual harassment,” as well as statements
22 made by executive branch officials regarding the consequences of violating Title
23 IX. *Id.* Internal patterns involve the past and current practices of the college
24
25

1 regarding Title IX investigations, including the disparity between how male and
2 female respondents are treated during the Title IX process. However, specific
3 statistical allegations are not necessary at an early stage, because “[i]t may be
4 difficult for a plaintiff to know the full extent of alleged discrimination in decision
5 making before discovery allows a plaintiff to unearth information controlled by the
6 defendant.” *Schwake*, 967 F.3d at 949. Internal pressures may also include articles
7 printed in college newspapers regarding the Title IX process. *Regents*, 23 F.4d at
8 938. Taken together, the external and internal pressures on the college are often
9 referred to as “background indicia of sex discrimination.” *Id.* at 939.

13 After considering the background indicia of sex discrimination, plaintiffs are
14 required to “combine those allegations with facts particular to his case.” *Id.* (citing
15 *Schwake*, 967 F.3d at 949)(cleaned up). Courts, including the *Schwake* and *Regents*
16 courts, look to whether the university’s process included any procedural
17 irregularities such as when “the university failed to consider the male accused’s
18 version of the alleged assault or to follow up with witnesses and evidence offered
19 in his defense” (*Schwake*, 967 F.3d at 951), or when “the appeals board exclusively
20 credited female testimony and rejected all male testimony.” *Doe v. Baum*, 903 F.3d
21 575, 586 (Sixth Cir. 2018). As the court held in *Regents*, “at some point an
22 accumulation of procedural irregularities all disfavoring a male respondent begins
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26 **PLAINTIFFS’ MOTION FOR A TEMPORARY**
27 **RESTRAINING ORDER- 9**
CASE 4:23-cv-05051-MKD

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1 to look like a biased proceeding despite the Regents' protests otherwise.” *Regents*,
2 23 F.4d at 941.

3
4 The facts surrounding the investigation and hearing, as alleged in the
5 complaint, are sufficient to show that sex was a motivating factor in expelling
6 Plaintiff. Regarding the background indicia of sex discrimination, the verified
7 complaint alleges that the 2011 Dear Colleague Letter, although technically
8 rescinded, still informs the college’s practice in conducting Title IX hearings,
9 especially considering statements made by Department of Education officials.
10 *Complaint* ¶ 77-83. The complaint also alleges that the college’s Title IX process
11 discriminates against male students because it repeatedly finds male students
12 responsible for violating Title IX regardless of the level of evidence available.
13 *Complaint* ¶ 86-88. Conversely, female students at Whitman are rarely determined
14 to have violated Title IX, in part because males at Whitman are afraid to report
15 allegations arising under Title IX, given the perceived bias against male students.
16
17 *Id.*

18
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20
21 The College also faces pressure from its community to do more to punish
22 students suspected of violating Title IX. *The Whitman Wire*, Whitman’s on campus
23 newspaper, has run eight articles regarding Title IX between the time of Plaintiff’s
24 enrollment at Whitman in September of 2019 and his hearing in February of 2023.

25
26 **PLAINTIFFS’ MOTION FOR A TEMPORARY**
27 **RESTRAINING ORDER- 10**
CASE 4:23-cv-05051-MKD

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1 *Complaint* ¶ 90. None of the articles were supportive of the College’s response to
 2 sexual assault on campus, with many of them challenging the College to do more.
 3 *Id.*¹ The College also faced pressure directly from Complainant, who threatened to
 4 sue the College for their handling of Title IX issues. *Id.* ¶ 92. And in 2014, Whitman
 5 was the subject of an investigation by the Department of Education’s Office for
 6 Civil Rights that garnered significant media attention. *Id.* ¶ 93. Taken together, the
 7 pressure from the school community, as evidenced by the school newspaper and
 8 Complainants threat to sue, highlights the pressure the College is under to
 9 overzealously prosecute Title IX violations.
 10
 11
 12

13 Regarding Plaintiff’s specific circumstance, the evidence shows that
 14 Whitman created an unfair process that Plaintiff had to go through to defend his
 15 innocence. The complaint outlines multiple incidents of procedural irregularities,
 16 with just a few highlighted below. Put simply, Plaintiff, a male, was denied the same
 17 opportunity to present evidence that Complainant, who is femme/nonbinary, was
 18 afforded.
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 20
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24 ¹ Article headlines include “Let’s Talk about Whitman’s Treatment of Sexual Assault,”
 25 “Whitman Didn’t Count You in the Security Report? Me too,” “Whitman College Blatantly
 26 Ignores Student Safety in Annual Security Report,” “Title IX: Survivors Deserve Better,” and
 27 “Beer Goggles, Munchies, and Title IX Violations. *Id.*”

1 The complaint highlights four procedural irregularities that tarnished the
 2 Title IX process, although Doe has identified far more than the four discussed in
 3 detail below. *See Id.* ¶ 50. (1) The College’s reliance on “pattern of conduct”
 4 evidence, without giving Doe an equal opportunity to present competing evidence,
 5 (*Id.* ¶ 37-40); (2) the prohibition on asking Complainant about their mental health,
 6 despite them making their mental health a central component of their story, (*Id.* ¶
 7 59-61); (3) The College’s reliance on “Witness G’s” recanted statements, instead of
 8 her actual statements, (*Id.* ¶ 60, 69); and (4) accepting and adopting the
 9 investigator’s conclusions, despite a clear policy against allowing the investigator
 10 to reach conclusions. *Id.* ¶ 69, 111.

14 As alleged in the complaint, one of the most glaring procedural irregularities
 15 is the College’s one-sided use of evidence. As an example, the College only allowed
 16 the use of “pattern of conduct” evidence when it supported Complainant’s story but
 17 refused to include evidence that tended to support Plaintiff’s story. *Id.* ¶ 37-40. As
 18 part of the report submitted to the hearing panel, the investigator included
 19 allegations by “Witness C” regarding her own relationship with Plaintiff.² *Doe*
 20 *Decl.* exhibit 1 at 35-38. Witness C’s relationship with Plaintiff is wholly unrelated
 21
 22
 23

24 ² Witness C’s statements were not just relegated to passing references either. As discussed later,
 25 the investigator (improperly) drew direct connections between Complainant’s story and Witness
 26 C’s account, thus having a tangible impact on the decision maker’s perception of the evidence.

1 to the sexual relationship between Plaintiff and Complainant. It was simply not
2 relevant and would have been excluded as improper character evidence in any
3 courtroom in Washington – state or federal. *See* Fed. R. Evid. 404(b) and Wash. R.
4 Evid. 404(b).
5

6 However, recognizing that the hearing panel was not a courtroom, nor subject
7 to evidence rules, Plaintiff provided to the investigator an account by another third
8 party (referred to in the documents as Witness G), which spoke clearly about her
9 own consensual relationship with Plaintiff. *Doe Decl.* exhibit 2 at 24. Specifically,
10 Witness G stated, “my numerous experiences of sex with [Plaintiff] during the time
11 we lived together between August and December 2020 were ALWAYS consensual,
12 and I never once felt unsafe, uncomfortable, or disrespected.” *Id.* Witness G also
13 recounted a story when she was in pain due to a medical condition – “I asked to
14 stop, and he immediately stopped. He asked if I was okay, I told him what was
15 going on, and he completely respected it...” *Id.* None of this information regarding
16 Plaintiff’s consensual relationship with Witness G was included in the final report.
17 *See Doe Decl.* exhibit 1 at 47-49 (the report’s narrative of Witness G statements).
18 Additionally, the report also failed to include relevant “pattern of conduct” evidence
19 against Complainant. This was not the first time Complainant has accused a male
20 of sexually assaulting them, having done so in December of 2019 before backing
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26 **PLAINTIFFS’ MOTION FOR A TEMPORARY**
27 **RESTRAINING ORDER- 13**
CASE 4:23-cv-05051-MKD

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1 down from their allegations. *Complaint* ¶ 9-10. However, this information was not
2 included in the report. Having made the decision to allow “pattern of conduct”
3 evidence in the hearing, the College discriminated against Plaintiff by refusing to
4 include exculpatory evidence offered in direct response to evidence offered by the
5 College.
6

7
8 Another example of the use of one-sided evidence is the College’s refusal to
9 allow Plaintiff’s advocate to question Complainant regarding her mental health.
10 *Complaint* ¶ 59. As the complaint alleges, Complainant is diagnosed with bipolar
11 disorder, and during the time Complainant initially made the allegations against
12 Plaintiff, they were not taking their medications. *Id.* ¶ 59. This is directly relevant
13 to their credibility, as Complainant, in other conversations, talks specifically about
14 altering their perception of events, and alleged that Doe had given them “Stockholm
15 Syndrome” as an excuse for why they continued to have sex with Doe for months.
16 *Doe Decl.*, exhibit 2 at 23, and *Complaint* ¶ 61. Because their mental health could
17 be a plausible explanation for their changing story about the nature of their
18 consensual relationship with the Doe, Plaintiff should have been allowed to
19 introduce evidence relevant to that.
20
21
22

23
24 Another, frankly bizarre, decision by the College was the choice to credit
25 Witness G’s recanted statements over her actual statements. Witness G originally

1 spoke with the investigator in August of 2022 but after reviewing the transcript for
 2 a second time, Witness G was “unhappy with how it looked. [She] wanted to clarify
 3 some things but was unsure if it was too late to do so or not...” prompting her to
 4 speak with Plaintiff’s advocate. *Doe Decl.* exhibit 4 at 14. The advocate “told [her]
 5 it was important for the investigator to hear the whole truth from [her] and it wasn’t
 6 too late to reach out to the investigator to revise [her] statement, which was not
 7 accurate as written.” *Doe Decl.* exhibit 4 at 14. In fact, Whitman policy specifically
 8 affords witnesses an opportunity to review and clarify their statements. *Doe Decl.*
 9 exhibit 6 at 30. The College effectively denied Witness G her right to do so. On
 10 September 29, 2022 Witness G emailed the investigator to “clarify” two statements
 11 and add one more. *Id.* The College’s findings specifically state “the panel
 12 determined that Witness G’s original statements were credible and relevant, and
 13 that Witness G’s revised and retracted statement was not credible...” *Doe Decl.*,
 14 exhibit 3 at 12.³ Relying on recanted statements that fit Complainant’s narrative,
 15 while discounting and refusing to accept the actual, corrected statements that
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22 ³ The Panel compounds their mistake by inaccurately stating the Respondent’s advisor had a role
 23 in revising and retracting Witness G’s statement. That is simply incorrect. Witness G specifically
 24 informed the hearing panel that Respondent’s Advisor did not help write her September 29, 2022
 25 statement and that, “It’s entirely my own.” *Doe Decl.* exhibit 4 at 6. As part of Plaintiff’s appeal,
 26 Witness G submitted a sworn affidavit saying, “I confirm that everything I stated in my September
 27 29, 2022 email, which included me recanting statements made during my interview, is true and
 28 correct.”

1 conform to Plaintiff's story is fundamentally irrational and procedurally
2 inappropriate.

3
4 Finally, the college violated its own policies by allowing the investigator to
5 make "credibility considerations" that were nothing more than credibility
6 determinations. Whitman's policy states "The investigator(s) gather, assess, and
7 synthesize evidence, **but make no conclusions**, engage in no policy analysis, and
8 render no recommendations as part of their report." *Doe Decl.* exhibit 6 (emphasis
9 added).
10

11
12 In direct violation of the prohibition on making conclusions, the investigator
13 concluded that "Information tending to support Complainant's allegations was
14 offered by several witnesses who said they did not currently have an active
15 friendship relationship with her: Witness A, Witness C, Witness D, Witness F," and
16 "As detailed in Section VIII above, witnesses corroborated: (a) seeing a bruise or
17 mark on Complainant's face or neck; (b) Complainant talking to them about a bruise
18 or mark; and (c) Complainant telling them about nonconsensual activity with
19 Respondent." *Doe Decl.* exhibit 1 at 68. The investigator's blanket statement
20 ignores the fact that each witness testified to different events occurring and often
21 times contradicted each other. For example, Witness C never corroborated seeing a
22 bruise on Complainants face, only her neck. *Doe Decl.*, exhibit 1 at 35. However,
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26 **PLAINTIFFS' MOTION FOR A TEMPORARY**
27 **RESTRAINING ORDER- 16**
CASE 4:23-cv-05051-MKD

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1 Complainant does not remember ever having a bruise on her neck. *Id.* At 23.
2 Notably, Doe putting his hands on Complainant's neck was described by
3 Complainant as "the things that I like" and that they were okay with "a normal
4 amount" of choking. *Id.*, exhibit 2 at 7 and exhibit 3 at 5. Witness D only testified
5 to seeing Respondent grabbing Complainant's arm at a party, which no other
6 witnesses corroborated. *Complaint*, ¶ 54. Witness F stated that Complainant told
7 him that Doe hit them "all the time," yet Complainant specifically told the
8 investigator that Witness F's account was inaccurate. *Id.* at 55. Finally, other
9 witnesses explicitly did not corroborate the allegations – including Witnesses A and
10 G. *See Doe Decl.* exhibit 2 at 23-25 and *Doe Decl.* exhibit 4 at 12-14.
11
12

13
14 Further compounding this error is the fact that the investigation's "credibility
15 consideration" section failed to address the two most glaring credibility issues for
16 Complainant (1) that as recently as three days before making their allegations and
17 throughout their relationship, they had repeatedly, and affirmatively stated Plaintiff
18 had not abused them and (2) that even after making the allegations, Complainant's
19 story varied wildly regarding which specific acts were or were not consensual.
20
21 *Complaint* at ¶ 49. Both choosing to make credibility "considerations" and not
22 including the most glaring issues, all to the benefit of Complainant, was
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1 procedurally inappropriate and strong evidence of bias against Doe. *Doe Decl.*
 2 exhibit 1 at 68.

3
 4 The procedural irregularities identified in the complaint and expanded on
 5 here were all to the benefit of Complainant and denied Plaintiff an opportunity to
 6 meaningfully respond to the evidence. Coupled with the background indicia of sex
 7 discrimination, Plaintiff is likely to show the decision to expel him was motivated
 8 by his sex. As such, he is likely to succeed on his Title IX claim.

10 **2. Breach of Contract**

11
 12 Washington courts have long recognized that “the relationship between a
 13 student and a university is primarily contractual in nature,” “with the specific terms
 14 to be found in the university bulletin and other publications,” since a formal contract
 15 is rarely prepared. *Marquez v. University of Wash.*, 32 Wn. App. 302, 305, 648 P.2d
 16 94 (1982), *review denied*, 97 Wn. 2d 1037 (1982), *cert. denied*, 460 U.S. 1013
 17 (1983).

18
 19 Whitman’s Student Handbook is precisely the type of “university bulletin
 20 and other publications” that inform Plaintiff’s contractual rights when attending
 21 Whitman. The Handbook contains a specific section regarding “Student Rights and
 22 Responsibilities,” which states in relevant part that
 23
 24

25 Whitman College has a strong commitment to the
 26 principle of nondiscrimination in all its forms. In its

27 **PLAINTIFFS’ MOTION FOR A TEMPORARY**
RESTRAINING ORDER- 18
 CASE 4:23-cv-05051-MKD

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admission, educational and employment practices, programs and activities, Whitman College does not discriminate on the basis of... sex... or any other basis prohibited by... Title IX of the Educational Amendments of 1972...”⁴

The Handbook also specifically links to the Colleges Sexual Harassment, Discrimination and Sexual Misconduct Policy.⁵ *Doe Decl.* exhibit 6 at 3. Specifically, within the policy, Whitman states;

the college has developed internal policies and procedures that provide a prompt, fair, and impartial process for those involved in an allegation of sexual harassment, sexual misconduct or retaliation that reflect college policy and are in compliance with the 2020 Title IX Regulations. Whitman values and upholds the equal dignity of all members of its community and strives to balance the rights of the parties in the grievance process during what is often a difficult time for all those involved.

Doe Decl. exhibit 6 at 8. The remainder of the policy identifies the procedural rights that a Respondent has during the Title IX process. *Doe Decl.* exhibit 6 at 29-30. These include:

- “All parties have a full and fair opportunity, through the investigation process, to suggest witnesses and questions, to provide evidence and expert witnesses, and to fully review and respond to all evidence on the record.”
- The right to a “thorough, reliable, and impartial investigation”
- The right to have “all available, relevant witness” be interviewed

⁴ Whitman’s Student Handbook is available online at <https://www.whitman.edu/dean-of-students/student-handbook/student-rights-and-responsibilities>.

⁵ <https://www.whitman.edu/documents/Global/Policies/Whitman-College-TitleIX-Policy.pdf>

- The right to review the draft investigative report, and make comments, to which the investigator “will incorporate relevant elements of the parties’ written responses into the final investigation report...”
- Limiting the investigator’s role to “gather, assess, and synthesize evidence, but make no conclusions, engage in no policy analysis, and render no recommendations as part of their report.”

Id. Regarding sanctions, the Handbook describes eight factors, which are nonexclusive factors the panel is expected to consider when deciding on an appropriate sanction. *Doe Decl.* exhibit 6 at 34.

The College breached each of the above promises with Doe. Instead of providing a “prompt, fair, and impartial” process for resolving the Title IX complaint against Doe, the College stacked the deck against him for the same reasons articulated above. Each one of those actions breached the contractual promise made to Doe to provide a “prompt, fair, and impartial” process. The breach of contract was directly and substantially related to Doe’s dismissal from the University.

3. Violation of the Covenant of Good Faith and Fair Dealing

Furthermore, under Washington law, “[t]here is in every contract an implied duty of good faith and fair dealing” that “obligates the parties to cooperate with each other so that each may obtain the full benefit of performance.” *Badgett v. Sec. State Bank*, 116 Wash.2d 563, 569, 807 P.2d 356 (1991). In particular, the duty of

1 good faith and fair dealing arises “when the contract gives one party discretionary
2 authority to determine a contract term.” *Goodyear Tire & Rubber Co. v. Whiteman*
3 *Tire, Inc.*, 86 Wn. App. 732, 738, 935 P.2d 628 (1997). “[G]ood faith limits the
4 authority of a party retaining discretion to interpret contract terms; it does not
5 provide a blank check for that party to define terms however it chooses. *Rekhter v.*
6 *State*, 180 Wn. 2d 102, 113 (2014)(quoting *Scribner v. Worldcom, Inc.*, 249 F.3d
7 902, 910 (9th Cir. 2001)). It is possible to breach the covenant of good faith and fair
8 dealing, even if all of the specific contractual terms of fulfilled. *Rekhter*, 180 Wn.
9 2d at 111-112.

10
11
12
13 While the overall process employed by the college against Doe violates the
14 covenant of good faith because it was biased against him from the start, there is one
15 component specifically worth highlighting here - the decision to expel Doe just
16 seven weeks before graduation. Expulsion – and thus withholding the college
17 degree that Doe has worked for years and paid over \$140,000 in tuition to complete
18 – is the ultimate punishment a college can employ, and the decision to expel Doe in
19 this case is not based on the terms of the handbook.

20
21
22 Rather than analyze all eight factors to develop its sanction decision, the
23 panel only considered the nature of the sustained allegations when it concluded
24 “The sustained policy violations relate to some of the most egregious forms of
25

1 conduct prohibited by Whitman College. Therefore, the panel determined that
2 Respondent should be expelled from Whitman College.” *Doe Decl.* exhibit 3 at 13.
3
4 This statement ignores the remaining factors the panel was expected to consider.

5 For example, the College should have taken into account that fact that
6 Complainant no longer attends Whitman, thus there would be no further impact on
7 Complainant. The Panel should have also considered the lengthy time frame
8 between when the alleged events occurred, when the allegations were first made,
9 and when this decision was handed down – encompassing all four years of Doe’s
10 enrollment. Finally, the College should have considered Doe’s proximity to
11 graduation and the fact that it had accepted Doe’s tuition payments just to pull the
12 rug out seven weeks before graduation.
13
14

15 Having failed to consider all the relevant factors identified in the policy, the
16 College violated the covenant of good faith and fair dealing when it expelled him
17 in a heavy-handed and overzealous decision guided more by political pressure and
18 a desire to appear tough on sexual assault than by a reasoned and individualized
19 determination that fits the nature of the allegations and the circumstances of this
20 matter.
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23 4. Consumer Protection Act 24 25

26 PLAINTIFFS’ MOTION FOR A TEMPORARY
27 RESTRAINING ORDER- 22
CASE 4:23-cv-05051-MKD

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1 The Consumer Protection Act provides that unfair or deceptive acts or
2 practices in the conduct of any trade or commerce are unlawful. RCW 19.86.020.
3 To prevail on a CPA action, the plaintiff must prove an “(1) unfair or deceptive act
4 or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury
5 to plaintiff in his or her business or property; (5) causation.” *Klem v. Washington*
6 *Mut. Bank*, 176 Wn. 2d 771, 782, 295 P.3d 1179, 1185 (2013).”
7
8

9 Here, the complaint shows that the College engaged in the deceptive practice
10 of guaranteeing to its students a fair and unbiased process for adjudicating
11 disciplinary issues, as stated numerous times in its Code of Conduct, but instead
12 offered a system that was one-sided, and intent on finding Doe responsible for the
13 allegations..
14

15 The College’s conduct occurred in the course of commerce, considering the
16 fact Doe has spent \$140,000 over the last four years in order to attend the college
17 (*Doe Decl.* at 18), and is likewise damaging to Doe’s property interest in the
18 education he was pursuing, including the credits he has already received, and his
19 general proximity to graduation. Additionally, the College’s actions further delay
20 Doe’s entry into the work force, as it is likely he will have to repeat one to two years
21 of study he has already completed. *Doe Decl.* ¶ 17. The College’s unlawful conduct
22 is also of interest to the public. As the Supreme Court explained in *Hangman Ridge*
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26 **PLAINTIFFS’ MOTION FOR A TEMPORARY**
27 **RESTRAINING ORDER- 23**
CASE 4:23-cv-05051-MKD

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1 *Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn. 2d 778, 790 (1986), the
 2 public interest prong turns on a number of factors, generally regarding whether the
 3 action is subject to repetition – “(1) Were the alleged acts committed in the course
 4 of defendant's business? (2) Are the acts part of a pattern or generalized course of
 5 conduct? (3) Were repeated acts committed prior to the act involving plaintiff? (4)
 6 Is there a real and substantial potential for repetition of defendant's conduct after
 7 the act involving plaintiff? (5) If the act complained of involved a single transaction,
 8 were many consumers affected or likely to be affected by it?” As discussed in detail
 9 above, given the enormous pressure on the College and the College’s swing towards
 10 overzealously prosecuting Title IX complaints, it is likely that more male
 11 respondents will find themselves denied a fair opportunity under the College’s
 12 process.

13 For those reasons, Doe is likely to prevail on his CPA claim.

14 **C. Plaintiff Will Suffer Irreparable Harm If He Is Unable to Continue**
 15 **Towards His Degree.**

16 Plaintiff is just weeks away from graduation and was allowed to continue to
 17 pursue his degree during the Title IX investigation, hearing, and appeal. *Doe Decl.*
 18 ¶¶ 3 and 19. When that appeal became final, Doe received an email confirming that
 19 the College’s registrar had processed the expulsion, effective March 28, 2023. *Doe*

1 *Decl.*, ¶ 16. As such, Plaintiff has exhausted any and all internal appeal processes
2 and has been expelled.

3
4 Absent an injunction from this court, he will be unable to complete his degree
5 before his expected graduation date. Neither money damages nor post-judgment
6 injunctive relief enabling his readmission will resolve the harm Doe will suffer. Doe
7 is in the middle of his last semester of classes, which means that should he choose
8 enroll and be accepted in another school during this litigation (even assuming he is
9 able to do so with the findings against him), Doe will, at a minimum, be required
10 retake the classes he is currently in, as well as the possibility of taking another 1 to
11 2 years of courses, as many colleges and universities do not allow students to
12 transfer and graduate within the same semester. *Doe Decl.* ¶ 17. This delay in
13 graduation would be noticeable in his academic records, which would expose him
14 to questions from graduate schools and potential employers about the causes of the
15 delay. A truthful response to those questions would require disclosure of “forcible
16 rape” allegations against him, which, even if overturned by this Court, would
17 forever alter his path in life. *See King v. Depauw Univ.* No. 14-cv-70, 2014 WL
18 4197507 at * 13 (S.D. Ind. Aug. 22, 2014) (“the stigma associated with [being found
19 guilty of sexual misconduct by your university] would not be adequately remedied
20 by money”). Several District Courts across the country have identified this very
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26 **PLAINTIFFS’ MOTION FOR A TEMPORARY**
27 **RESTRAINING ORDER- 25**
CASE 4:23-cv-05051-MKD

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1 harm as irreparable. *See Doe v. Univ. of Connecticut, No. 3:20CV92 (MPS), 2020*
 2 *WL 406356, at *2 (D. Conn. Jan. 23, 2020)* (“For a college student poised to
 3 graduate in a few months, it is highly likely that a two-year suspension and a
 4 sanction for sexual assault would indeed “forever change[]” the trajectory of his
 5 education and career. If he is not permitted to enroll in the Spring 2020 semester,
 6 he would need to explain a gap on his résumé in future applications to schools or
 7 jobs”), and *Doe v. Siena Coll., No. 122CV1115BKSTWD, 2023 WL 197461, at*
 8 **13 (N.D.N.Y. Jan. 17, 2023)* (“The Court concludes that Plaintiff has shown a
 9 likelihood of irreparable harm in the absence of injunctive relief. While Defendant
 10 argues that a delay in graduation is quantifiable and can be adequately compensated
 11 by money damages, Plaintiff has demonstrated that he will suffer more than simply
 12 a delay in his graduation”) (gathering cases). Plaintiff faces this very same
 13 irreparable harm found by these other courts.

18 **D. The Balance of Hardships Tips Sharply in Favor of Doe**

19 Plaintiff is willing and able to complete his degree remotely, such that he
 20 does not need to be on campus during the pendency of this litigation. *Doe Decl.* ¶
 21 14. As articulated above, not allowing Doe to proceed towards his degree during
 22 this litigation would have far reaching impact on his life moving forward. On the
 23 other hand, there is little to no harm to the College. While the College may have an
 24

1 interest in protecting its campus, these allegations are from Doe's freshman year,
2 three years prior, and there have been no other incidents of sexual misconduct,
3 including his relationship with Witness C, which the hearing panel referred to as
4 "not unwelcome." *Complaint*, ¶¶ 8 and 66 n. 2. During the pendency of the
5 allegations, investigation, and hearing, Doe was allowed and in fact did continue to
6 attend classes, although he did so remotely. *Doe Decl.* ¶ 19. Furthermore, to the
7 extent their interests can be considered, there is no impact on Complainant because
8 they no longer attend Whitman and do not even live in Washington. *Id* at ¶ 15.

11 On the other hand, there will be no long-term impact on the College if they
12 are ultimately successful. Doe would not oppose allowing the College to abstain
13 from formally conferring his degree pending this litigation. Meaning, while Doe
14 would be allowed to complete his course work, and his transcript would reflect
15 completion in Spring 2023, the College would not need to formally give him the
16 degree unless and until Doe is successful in this litigation (or a resolution is
17 reached), with a retroactive date reflecting conferral at the end of Spring 2023
18 semester. As such, the hardship Doe will face far outweighs any prejudice to the
19 College. Plaintiff has demonstrated substantial and irreparable harm should the
20 Court not provide immediate injunctive relief.

21 **E. Public Interest does not weigh against denying a Temporary Restraining**
22 **Order**

23 PLAINTIFFS' MOTION FOR A TEMPORARY
24 RESTRAINING ORDER- 27
25 CASE 4:23-cv-05051-MKD

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2 In analyzing the public interest prong, both the district courts in *Siena*
3 *College* and *Middlebury College* agreed that, while there is a public interest in
4 maintaining campus safety, both students continued to be enrolled at the school
5 during the investigation and hearing process, and that neither posed a threat to
6 campus safety. *Middlebury Coll.*, 2015 WL 5488109, at *4, and *Siena Coll.*, 2023
7 WL 197461, at *21. The same is true here. *Doe Decl.* at ¶ 19. As such, granting the
8 TRO does not run afoul of that public interest. As the Court in *Siena* also held,
9 “Siena can still fully enforce its disciplinary policies by revoking Plaintiff’s diploma
10 and ‘maintain[ing] Plaintiff’s disciplinary record in its files’ if it prevails in this
11 case” obfuscating any concern about a public interest in enforcing university
12 disciplinary policies. *Siena Coll.*, 2023 WL 197461, at *21. Conversely, there is a
13 public interest in ensuring Colleges and Universities that receive federal financial
14 assistance and make promises to their students are held to those promises. Because
15 of that public interest, this court should grant the temporary restraining order.
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20 **F. Viability of Requested Relief**

21 During the Status Conference, ECF No. 4, this Court instructed parties to
22 brief the viability of implementing a temporary restraining order/preliminary
23 injunction. Plaintiff believes implementing a temporary restraining order in this
24
25

1 matter is easily viable, and only turns on Doe's willingness to work hard to make
2 up for the lost time.

3
4 Plaintiff continued to attend class until March 28, 2023. *Doe Decl.* ¶ 19. At
5 the time, Doe was taking four classes – his senior psychology thesis course, an
6 upper-level economics course, a fine arts class (art history), and yoga. *Id.* He is
7 double majoring in Psychology and Economics, and needs only the fine arts credit,
8 the economics credit, and the thesis credit to graduate. *Id.* at ¶ 19. After the hearing,
9 he was attending the economics and art class remotely through Zoom, until he was
10 notified of his expulsion. *Id.* Doe sees no barrier to continuing to take those classes
11 over Zoom, although he recognizes the need to work hard and catch-up. *Id.* at 20.

14 The biggest hurdle is his senior psychology thesis course. He needs to
15 complete the following: attend a weekly meeting with his thesis advisor, conduct
16 an online study, analyze the results, attend a weekly seminar, and present the results
17 to other seniors and a panel of psychology professors. Again, meeting with his
18 advisor, conducting the online study and analyzing the results can be done either
19 online or independently. Given zoom and other online platforms capabilities, Doe
20 strongly believes he would be able to present the findings to other seniors and
21 psychology professors virtually as well. As such, Doe believes he can jump back
22 into his classes, redouble his efforts to make up for the roughly 20 days he has
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missed, and complete his course work on time. Additional options are discussed in Doe's declaration, ¶¶ 22 and 23.

VI. CONCLUSION

For the foregoing reasons, Plaintiff asks that this court enter a temporary restraining order and set a date to hear argument on a full preliminary injunction.

Dated this 21st day of April, 2023.

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